SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 311

PERMA-HOME CORPORATION
and
VICTOR LEAVITT,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No.

PERMA-HOME CORPORATION
and
VICTOR LEAVITT,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Perma-Home Corporation and Victor Leavitt, by their attorneys, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered on May 22, 1967.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 11, is not as yet reported.

Jurisdiction

The judgments of the court below were entered on May 22, 1967. They are set forth on page 216 of the Certified Copy of Consolidated Record Appendix to Brief For Appellants and Proceedings in the Court Below, filed with this petition, and are also printed in Appendix A hereto, *infra*, pp. 20-21. A petition for rehearing was filed on June 2, 1967 (R.A.[1] 216-221). Rehearing was denied on June 7, 1967. (R.A. 222.) The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Question Presented

1. May an inference, that an officer of a corporation read, and therefore knew, the contents of an FH-1 credit application be based or piled upon the inference, that when he signed the completion certificate and endorsed the note for that transaction, the credit application was usually in front of him?

2. Assuming that the piling of inference upon inference may be permitted, was the evidence sufficient to warrant the finding that the officer knew that the FH-1 credit application contained a false statement?

3. Assuming that the evidence was insufficient to warrant the officer's conviction, may the knowledge and willfulness of one as low in a corporate organization as a salesman be imputed in a serious criminal case to his corporate employer?

Constitutional and Statutory Provisions Involved

There are no constitutional or statutory provisions involved in this case.

[1] "R.A." refers to the Certified Copy Of Consolidated Record Appendix To Brief For Appellants And Proceedings In The Court Below.

Statement of the Case

On June 25, 1965, a one count indictment was returned against petitioners Perma-Home Corporation (Perma-Home) and Victor Leavitt (Leavitt) and two other defendants, Lawrence G. Conboy, Sr. (Conboy), who was acquitted, and Everett L. Parker, Jr. (Parker), whose conviction was affirmed by the court below.

The indictment charged all four defendants with having, on or about June 29, 1963, "for the purpose of obtaining a loan from the National Shawmut Bank of Boston . . . for improvements upon the premises of (the defendant Conboy) . . . located at Old Chesterfield Road, Spofford, New Hampshire, with intent that such loans be offered to and accepted by the Federal Housing Administration for insurance," wilfully and knowingly made, passed, uttered and published and caused to be made, passed, uttered, and published to the National Shawmut Bank of Boston "a certain false statement in a document, that is, an FH-1 Credit Application for a Property Improvement Loan dated June 29, 1963, over the signature of (Conboy) . . . as borrower and the signatures of (Parker and Leavitt) . . . for and in behalf of Perma-Home . . . wherein said defendants represented that the defendant-borrower . . . had no debt outstanding against him, whereas, in truth and in fact, the said statement was false, the said defendants then and there well knowing that the defendant . . . Conboy . . . had several debts outstanding against him; in violation of 18 U.S.C. 1010." (R.[2] 2-3.)

Each defendant pleaded not guilty.

Trial commenced before District Judge Caffrey and a jury on October 4, 1966.

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[2] "R." refers to Record Appendix To Brief For Appellants.

The evidence produced by the government, up to the time it rested, showed the following:

Perma-Home, a Massachusetts corporation with a place of business in the City of Lynn, sells home improvements so-called, i.e., roofing, siding, etc. Leavitt, its president, is actively engaged in the day to day operations of this business. Parker is a salesman for this company with authority to sign contracts and related documents on its behalf and Conboy was a customer of Perma-Home who, together with his wife, signed the F.H.A. application in question. Besides Leavitt and Parker, Perma-Home employs an office manager, office help, other salesmen and solicitors. It literally had hundreds of transactions with just one of the lending institutions with which it placed business. (R. 4, 17.)

On May 22, 1963, Parker sold certain home improvements to the Conboys on their residence in Spofford, New Hampshire. In order to formalize the deal he had the Conboys sign a Perma-Home contract for $1,800, of which $1,000 was for certain home improvements, the balance to be used to pay Conboy's indebtedness to a company known as Keene Finance Corporation. This contract was to be financed by Security Acceptance Corporation (S.A.C.). In addition to the contract, Parker had the Conboys sign certain other documents which were necessary for the financing of the S.A.C. loan. Among these was a promissory note and also a power of attorney under which S.A.C. could secure payment of the note by a mortgage on the Conboy's home. At some undetermined time S.A.C. exercised this power and took the mortgage. Parker also elicited certain information from the Conboys that was necessary for the loan application. This included such information as outstanding bills and credit references. He wrote all this down on a yellow Perma-Home form. Parker listed "Whatever debts the Conboys told me they owed." The

only outstanding Conboy obligation was a debt owing to Keene Finance Corporation.

The next day Parker telephoned this credit information into Perma-Home's office where it was recorded and a folder made up for this job. Later, Parker delivered all the documents to the Perma-Home office where they were filed in the Conboy folder. S.A.C. accepted the loan and Leavitt signed and sent a Perma-Home check for $800 to the Conboys, who used it to pay off Keene Finance Corporation.

On May 27, 1963, Parker negotiated another contract with the Conboys for $2,950. Perma-Home had no record of this transaction.

On June 29, 1963, Parker again sold the Conboys some additional home improvements in the amount of $1,450. In this connection Parker filled out the customary yellow Perma-Home form but did not put any credit information on it. The Conboys also desired to finance this contract and Parker had them sign the FH-1 credit application which is the subject of this indictment. There was testimony by Perma-Home's office manager that in the usual course of business FH-1 applications were prepared at the company office and then signed by the salesman and the home owner. Prior to delivering this application (FH-1 form) to Perma-Home, Parker telephoned the information relative to the sale to his office and asked "them" to get the credit information from the folder on the prior transaction of May 22. On July 1 someone in the Perma-Home office telephoned the loan application for the June 29 contract into the National Shawmut Bank but so far as appears did not mention to the bank the prior S.A.C. loan. Moreover, the bank's Investigation Work Sheet, which contained the information submitted to the bank over the phone, listed only three firms under the heading of "all open or recently paid instalment, trade or business ac-

counts''. The recently paid up $800 Keene Finance obligation was not included as a reference.

On July 3, 1963, the bank approved this loan and on August 6 Perma-Home sent the bank a completion certificate, the contract, the security note and the FH-1 credit application. The FH-1 credit application did not mention the prior S.A.C. transaction and no debts whatever were listed on this document. At some time during the pendency of this loan application, the bank became aware of the S.A.C. transaction.

On August 6, 1963, Shawmut issued its check to Perma-Home for $1,450. and submitted the loan to the FHA for insurance—which FHA accepted. The Conboys never made any payments on this loan. This was the state of the evidence when the government rested. (Appendix A hereto, *infra,* pp. 13-16.)

Except for evidence that ''it was the usual practice at Perma-Home to have all the papers prepared for submission to the bank at the same time (and) . . . for Leavitt to have all the documents relating to a loan readily available to him when he signed the completion certificate and endorsed the note'' for a loan (Appendix A hereto, *infra,* p. 16); there was no evidence that when Leavitt signed the completion certificate and endorsed the note, which in this case were to be sent to Shawmut, he had the FH-1 credit application in front of him, or that he had ever seen that application, or that he knew that information had been withheld from or misinformation had been furnished to Shawmut.

After the government put in its case, defendants moved for judgments of acquittal under Fed. R. Crim. P. 29(a) on the ground that the evidence was insufficient to sustain a conviction. The trial court reserved decision on these motions. Thereupon Conboy and his wife took the witness stand and gave their version of the circumstances sur-

rounding the signing of the F.H.A. application. Their testimony tended to exculpate Conboy, but implicated Parker. Quite understandably, Parker then took the stand in his own defense.[3] Neither Perma-Home nor Leavitt offered any evidence in their own behalf. At this point the defendants rested and renewed their motions for judgments of acquittal, but the trial court again reserved decision and submitted the case to the jury. (Appendix A hereto, *infra*, pp. 12-13.)

The jury returned verdicts acquitting Conboy, but finding Perma-Home, Leavitt and Parker guilty as charged.[4] Perma-Home was sentenced to pay a fine of $5,000 and Leavitt was sentenced to be imprisoned for three months and to pay a fine of $5,000. The sentences were stayed pending appeal and petitioners filed seasonable notices of appeal to the court below. (R.A. 199-203.)

The court below affirmed the judgments of the district court, examining only evidence produced by the government in order to avoid considering petitioners' contention, that subsequent testimony introduced as part of the defenses of Conboy and Parker could not have been considered by the trial judge in ruling upon their motion for judgment of acquittal, filed immediately after the close of the government's case, and could not be considered by the court below in reviewing on appeal the sufficiency of the evidence then in the record.[5] It upheld the piling of inference upon inference and the sufficiency of the evidence to sustain the convictions of Leavitt and Parker and held

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[3] For the most part, his testimony tended to rebut and impeach that of Conboy.

[4] After verdict, the trial court denied all motions for judgment of acquittal whether made before or after verdict.

[5] See, e.g., *Franklin* v. *United States*, 330 F.2d 205, 208 (D.C. Cir., 1964); and *Cephus* v. *United States*, 324 F.2d 893, 895-898 (D.C. Cir. 1963).

that "in determining whether Perma-Home had the requisite knowledge, it is necessary only to show that its corporate officers, agents or employees had knowledge (and that, consequently) . . . Leavitt's, as well as Parker's, own knowledge of the false statements in the FH-1 credit application can be imputed to the co-defendant corporation." (Appendix A hereto, *infra*, pp. 17-19.)

Petitioners seasonably filed a petition for rehearing which was denied by the court below after correcting a factual error. (R.A. 222.)

The court below stayed its mandates.

Reasons for Granting the Writ

I.

From "testimony that it was the usual practice for Leavitt to have all the documents relating to a loan readily available to him when he signed the completion certificate and endorsed the note" (Appendix A hereto, *infra*, p. 16), the jury was permitted to infer not only that the FH-1 credit application was in front of him when he signed the certificate and endorsed the note which were to be forwarded to the Shawmut, but also (from that inference) that "Leavitt examined . . . and in doing so noticed or knew of the contents of the FH-1 form" (Appendix A hereto, *infra*, p. 18.) The sanctioning of the drawing of one inference from another inference seems to be directly in conflict with the decisions of this Court. In *United States* v. *Ross*, 92 U.S. 281, 284 (1876), this Court said: "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed . . . . A presumption which the jury is to make is not a circumstance in proof; and is not, therefore, a legitimate foundation for a presumption." In *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943), this Court

said: "(C)harges . . . are not to be made out by piling inference upon inference, . . ." This seeming conflict between the decisions of the court below and decisions of this Court is, in the opinion of petitioners, of sufficient importance to the administration of criminal law in the federal courts that it should be resolved.

II.

Assuming, contrary to the position of petitioners, that the evidence warranted an inference that Leavitt knew the contents of the FH-1 credit application, there still was no evidence that his attention had been directed to the earlier S.A.C. transaction when he signed the completion certificate and note. Nor was there any evidence of any concurrent or subsequent act or statement by him indicating that he knew about or remembered the prior S.A.C. loan. That loan had been a simple, routine transaction in the day of a very active business and the endorsing of a note, the signing of a completion certificate and the signing of a check to pay-off an existing obligation on a non-insured loan were highly unlikely to have made any impression on Leavitt. As a result, petitioners believe that the conclusion of the court below, that Leavitt knew of the falsity of the statements in the FH-1 credit application, was erroneous and that he was entitled to an acquittal.

III.

Assuming that the evidence was insufficient to warrant Leavitt's conviction, whether Perma-Home's conviction can be upheld depends upon the resolution of the question of whether the knowledge and willfullness of one as low in a corporate organization as a salesman can properly be imputed to his corporate employer. Petitioners believe that that question must be answered in the negative in a serious criminal case such as here involved and that the entire

subject of corporate criminal responsibility for the acts of its employees should be reviewed and clarified. Cf. *United States* v. *Carter*, 311 F.2d 934, 942-943 (6th Cir. 1963); *Empire Printing Co.* v. *Rodess*, 247 F.2d 8, 17 (9th Cir. 1957).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6833.

EVERETT L. PARKER, JR.,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6834.

PERMA-HOME CORPORATION,
DEFENDANT, APPELLANT;
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6835.

VICTOR LEAVITT,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Charles M. Burnim, with whom *F. Lee Bailey* was on brief, for appellant in No. 6833.
Manuel Katz, with whom *Paul T. Smith* was on brief, for appellants in Nos. 6834 and 6835.

Albert F. Cullen, Jr., Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, was on brief, for appellee.

May 22, 1967.

McENTEE, *Circuit Judge*. Defendants, Perma-Home Corporation, Leavitt and Parker, together with one Conboy, were indicted for knowingly submitting a false F.H.A. loan application to the National Shawmut Bank of Boston for the purpose of obtaining an F.H.A. loan from the bank.[1] Perma-Home, a Massachusetts corporation with a place of business in the City of Lynn, sells home improvements so-called, i.e., roofing, siding, etc. Leavitt, its president, is actively engaged in the day to day operations of this business. Parker is a salesman for this company with authority to sign contracts and related documents on its behalf and Conboy was a customer of Perma-Home who, together with his wife, signed the F.H.A. application in question.

The case was tried to a jury. After the government had put in its case, defendants moved for judgments of acquittal under Fed. R. Civ. P. 29(a) on the ground that the evidence was insufficient to sustain a conviction. The trial court reserved decision on these motions. Thereupon Conboy and his wife took the witness stand and gave their version of the circumstances surrounding the signing of the F.H.A. application. Their testimony tended to exculpate Conboy, but implicated Parker. Quite understandably,

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[1] The statute, 18 U.S.C. § 1010, under which this one count indictment was brought, reads in pertinent part as follows:

> "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, . . . or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, . . . shall be fined not more than $5,000 or imprisoned not more than two year, or both."

Parker then took the stand in his own defense.[2] Neither Perma-Home nor Leavitt offered any evidence in their own behalf. At this point the defendants rested and renewed their motions for judgments of acquittal, but the trial court again reserved decision and submitted the case to the jury. The jury returned verdicts acquitting Conboy, but finding Perma-Home, Leavitt and Parker guilty as charged. The three last named defendants appealed. Their principal contention is that in passing on these motions the trial court was restricted to the government's evidence at the time it rested; that at that time the evidence was not sufficient to sustain a conviction and therefore the trial court erred in not granting these motions.[3] Obviously, if the evidence at that time is sufficient to sustain a conviction, we need not consider the question of whether the trial court was so restricted. Accordingly, we turn to an examination of the evidence produced by the government.

On May 22, 1963, Parker sold certain home improvements to the Conboys on their residence in Spofford, New Hampshire. In order to formalize the deal he had the Conboys sign a Perma-Home contract for $1,800, of which $1,000 was for certain home improvements, the balance to be used to pay Conboy's indebtedness to a company known as Keene Finance Corporation. This contract was to be financed by Security Acceptance Corporation (S.A.C.). In addition to the contract, Parker had the Conboys sign certain other documents which were necessary for the financing of the S.A.C. loan. Among these was a promissory note and also a power of attorney under which S.A.C. could secure payment of the note by a mortgage on the Conboy's home. At some undetermined time S.A.C. exer-

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[2] For the most part, his testimony tended to rebut and impeach that of Conboy.

[3] After verdict, the trial court denied all motions for judgment of acquittal whether made before or after verdict.

cised this power and took the mortgage. Parker also elicited certain information from the Conboys that was necessary for the loan application. This included such information as outstanding bills and credit references. He wrote all this down on a yellow Perma-Home form. Parker listed "Whatever debts the Conboys told me they owed." The only outstanding Conboy obligation listed was a debt owing to Keene Finance Corporation.[4]

The next day Parker telephoned this credit information into Perma-Home's office where is was recorded and a folder made up for this job. Later, Parker delivered all the documents to the Perma-Home office where they were filed in the Conboy folder. S.A.C. accepted the loan and Leavitt signed and sent a Perma-Home check for $800 to the Conboys, who used it to pay off Keene Finance Corporation.

On May 27, 1963, Parker negotiated another contract with the Conboys for $2,950. Perma-Home had no record of this transaction.

This brings us to the transaction which gave rise to this indictment. On June 29, 1963, Parker again sold the Conboys some additional home improvements in the amount of $1,450. In this connection Parker filled out the customary yellow Perma-Home form but did not put any credit information on it. The Conboys also desired to finance this contract and Parker had them sign the FH-1

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[4] In relevant part the yellow sheet contained the following:

"TRADE REFERENCES

Name and Address of Firm	*Orig. Amt.*	*Bal.*	*Mo. Pay*	*Status*
1. Keene Finance, ... Keene, N. H.	1080—	800	45—	good
2. Coastal Accept. Corp., ... Keene, N.H.	416	no	—	pd. ahead
3. G. M. A. C. ..... Manchester, N.H. car	1700—	—	—	pd. ahead
4. Safford Gas Co., ... Water St., Keene, N.H."	400—	no	—	pd. ahead

credit application which is the subject of this indictment. There was testimony by Perma-Home's office manager that in the usual course of business FH-1 applications were prepared at the company office and then signed by the salesman and the home owner.[5] Prior to delivering this application (FH-1 form) to Perma-Home, Parker telephoned the information relative to the sale to his office and asked "them" to get the credit information from the folder on the prior transaction of May 22. On July 1 some one in the Perma-Home office telephoned the loan application for the June 29 contract into the National Shawmut Bank[6] but so far as appears did not mention to the bank the prior S.A.C. loan. Moreover, the bank's Investigation Work Sheet, which contained the information submitted to the bank over the phone, listed only the following three firms under the heading of "all open or recently paid instalment, trade or business accounts": (1) Coastal Acceptance, (2) G. M. A. C. and (3) Safford Gas Company. The recently paid up $800 Keene Finance obligation was not included as a reference.

On July 3, 1963, the bank approved this loan and on August 6 Perma-Home sent the bank a completion certificate, the contract, the security note and the FH-1 credit application. The FH-1 credit application did not mention the prior S.A.C. transaction and no debts whatever were listed on this document.[7] At some time during the pend-

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[5] It is not clear when this FH-1 form was signed or if it was filled in at the time of signing. On direct examination, Conboy testified it might have been filled out when he signed it. On cross-examination he testified it could have been blank. Parker testified that both he and Conboy signed it in blank.

[6] There was no evidence as to who called this credit information into the bank.

[7] The four trade references listed in note 4, supra were listed in the appropriate place as firms that had extended credit to the Conboys, and in the space provided for the listing of outstanding obligations only the words "No Mortgage" appeared.

ency of this loan application, the bank became aware of the S.A.C. transaction.[8]

There was testimony that it was the usual practice at Perma-Home to have all the papers prepared for submission to the bank at the same time and that practice was followed in this instance. There was also testimony that it was the usual practice for Leavitt to have all the documents relating to a loan readily available to him when he signed the completion certificate and endorsed the note which in this case were to be sent to Shawmut.

On August 6, 1963, Shawmut issued its check to Perma-Home for $1,450 and submitted the loan to the FHA for insurance—which FHA accepted. The Conboys never made any payments on this loan[9] This was the state of the evidence when the government rested.

In testing the sufficiency of this evidence on a motion for judgment of acquittal, we must determine whether there is substantial evidence from which a jury might fairly conclude guilt beyond a reasonable doubt. *United States* v. *Conti*, 339 F.2d 10 (6th Cir. 1964).[10] In making such a determination we must view the evidence and the inferences that may be reasonably drawn therefrom in the light most favorable to the government, *United States* v.

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[8] The assistant office manager of the Installment Loan Department at Shawmut testified that the work sheet containing the information submitted over the phone and used to record the credit investigation, contained a reference to the S.A.C. transaction, among the notations on the reverse side, which said, i.e., "1,800 discussed by Security. Acceptance, work financed by security on the old part of home. Our deal on new addition to home." Though he testified on cross-examination that the bank must have been aware of the S.A.C. deal at the time the loan was accepted, he acknowledged on re-direct that he didn't have any idea when this writing was put on the back of the document.

[9] FHA reimbursed the bank in accordance with its commitment.

[10] *But see, Weathers* v. *United States*, 322 F.2d 566, 568 9th Cir. 1963). See also, Comment, The Motion For Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151, n. 17 (1961).

Conti, supra. Cf. *Dirring* v. *United States,* 328 F.2d 512 (1st Cir.), *cert. denied,* 377 U.S. 1003 (1964).

From our examination of the evidence presented by the government we think the jury could fairly conclude beyond a reasonable doubt that these three defendants were guilty of knowingly filing an FH-1 application which contained false statements. The evidence introduced by the government was sufficient to show that this application contained a false statement. Nothing at all appeared regarding the outstanding S.A.C. obligation. Furthermore, although S.A.C. took a mortgage on the Conboy home as security for its May 22 loan of $1,800, under the heading in the FH-1 application entitled "List of all obligations" there is the statement "No mortgage."[11]

Perma-Home is a small company. The defendant Leavitt, its president, is very active in the day-to-day operations of the company. Not only is he the key man in this organization, present most of the time in the office, but it is also fair to infer that he knew and had his thumb on what went on in the company. In the instant case the evidence shows that he had knowledge of both the S.A.C. loan to the Conboys of a month earlier and of the S.A.C. mortgage that secured payment of it, signing a check for $800 payable to the Conboys on June 12, at which time all papers on the transaction were in front of him. He also knew that Conboys' June 29 application to a different lender for an F.H.A. loan involved the matter of their credit. After the home improvements involved in this case were completed, it was Leavitt who signed the completion certificate and note. It is to be borne in mind that in many cases, of which this one is an obvious example, whether or not Perma-Home is to be paid for the work which, by hypothe-

[11] See footnote 7.

sis, has already been completed depends upon the success of the loan application.

As was the usual practice, all the papers pertaining to the Conboy deal were filed in a separate folder in the customer's name. The office manager testified that it was also the usual practice for Leavitt to have the entire file with reference to the transaction in front of or readily available to him when a transaction reached the point of signing the completion certificate. There is no evidence in this case that there was any departure from this practice. On the same day that he signed the completion certificate and note, these, together with the contract and credit application were forwarded to the bank.

We think that under all the circumstances the jury could have reasonably inferred that Leavitt examined the Conboy folder in conjunction with signing the completion certificate which was essential in order for Perma-Home to be paid by the bank and in so doing noticed or knew of the contents of the FH-1 form. Also, in this folder was at least one other paper—the company's own credit information sheet which should have but did not contain any credit information on the Conboys. Such an omission was unusual. Nor was there any salesman's copy of the credit sheet in the folder—none having been written up for this transaction. This was also unusual. From these unusual credit omissions and Leavitt's knowledge of the recent S.A.C. deal with the Conboys, the jury also could have reasonably inferred that he knew the FH-1 credit application was false. Yet despite this, he allowed this application, together with the other pertinent papers in the file, to be sent to the bank and ultimately to F.H.A. Although Leavitt himself did not sign the FH-1 application, the jury was warranted in finding that he affirmatively participated in passing the false statement contained therein to F.H.A.

There is no doubt that Parker also knew about the prior S.A.C. loan and mortgage. As the office manager for Perma-Home testified, the FH-1 application was prepared in the Perma-Home office in the usual course of business and later signed by the borrower and the salesman. From this the jury could reasonably infer that at the time Parker signed this application it was already filled out. In determining whether Perma-Home had the requisite knowledge, it is necessary only to show that its corporate officers, agents or employees had knowledge. Thus, Leavitt's as well as Parker's knowledge of the false statements in the FH-1 credit application can be imputed to the co-defendant corporation.

The evidence also shows that in telephoning in the loan application to Shawmut on July 1, 1963, the Perma-Home office did not mention either the prior S.A.C. loan, the S.A.C. mortgage or the recently paid up Keene Finance obligation, although they knew of them. Significantly, part of the proceeds of the S.A.C. loan were used to pay off the Keene Finance obligation. These two transaction were linked together. Although this Keene Finance obligation was subsequently listed on the FH-1 application, by that time Shawmut had already approved the loan. From this the jury could have reasonably inferred that Perma-Home neglected to mention the Keene obligation because it feared that an investigation of this would lead to discovery of the S.A.C. obligation. This inference in turn would support the conclusion that the non-disclosure of the latter was intentional.

All other points raised have been considered and found to be without substance.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6834.

PERMA HOME CORPORATION,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
May 22, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc. Messrs. Katz and Cullen.]

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6835.

VICTOR LEAVITT,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT

May 22, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc. Messrs. Katz and Cullen.]

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 311

PERMA-HOME CORPORATION AND VICTOR LEAVITT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the evidence was sufficient to support the convictions.

STATEMENT

Petitioners, together with Parker and Conboy, were charged in an indictment returned in the United States District Court for the District of Massachusetts with knowingly submitting a false F.H.A. loan application to the National Shawmut Bank of Boston for the purpose of obtaining an F.H.A. loan (R. 2–3). The jury acquitted Conboy, but found the other three defendants guilty (R. 197). On October 24, 1966, peti-

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tioner Perma-Home was ordered to pay a $5,000 fine, and Leavitt was sentenced to imprisonment for three years and given a fine of $5,000 (R. 199–201).[1] The convictions were affirmed on appeal (R. 203–204, 216).

Perma-Home is a company engaged in selling home improvements, and Leavitt, its president, was actively engaged in its daily operations (R. 4, 57, 62). The transaction charged in the indictment relates to a contract of June 29, 1963, for home improvements negotiated with Conboy by Parker, a salesman for Perma-Home. The contract was purchased by the Shawmut bank and submitted to F.H.A.

The government's evidence[2] showed that in May 1963 Parker had sold Conboy on a credit basis certain improvements on the latter's home, obtaining credit information that he wrote down on a yellow form (G. Ex. 11; R. 53) which listed an indebtedness to the Keene Finance Co. (see Pet. App. 14, n. 4). In accordance with the usual practice, that credit information was recorded at the Perma-Home office and a folder was made up for the job (R. 53–54). The office manager of Perma-Home called in the information on the contract and credit of the home owner to Securities Acceptance Corporation (S.A.C.) (R. 52), which agreed to purchase the loan. After the job was completed, on June 12, 1963, the loan documents—including a note signed by the Conboys and endorsed by

[1] Parker was sentenced to imprisonment for 30 days (R. 201–202). He has not filed a petition for a writ of certiorari.

[2] The court of appeals, in reviewing the district court's denial of a motion for acquittal, considered only the government's evidence.

petitioner Leavitt for Perma-Home, papers enabling S.A.C. to get a mortgage to secure the loan, and a completion certificate signed by the Conboys and Leavitt for the corporation—were forwarded to S.A.C. (Ex. 5 A–C; R. 16, 18, 19). S.A.C. bought the loan for $1,800 (R. 16). On June 12, 1963, Leavitt signed a Perma-Home check for $800 payable to the Conboys (G. Ex. 16; R. 61). This was used by the Conboys to pay off the loan to Keene Finance Co. listed on the credit application (R. 72–73).

On June 29, 1963, Parker sold the Conboys further improvements for which they executed a contract to pay $1,450 (Ex. 1; R. 54–56). No credit information sheet was filled out this time; Perma-Home, when the contract was called in, was directed to get the credit information from the prior deal (R. 50, 52). It was in connection with this transaction that the Conboys (at a time not specified in the evidence) signed the Federal Housing Credit Application which is the subject of the indictment (Govt. Ex. 4; R. 23).

On July 1, someone in the Perma-Home office telephoned a loan application for the June 29 contract to Shawmut (R. 52, 77). On Shawmut's investigation work sheet, which contained information given to Shawmut over the telephone, the following items were listed under the heading for "all open or recently paid instalment, trade or business accounts": (1) Coastal Acceptance, (2) G.M.A.C., and (3) Safford Gas Company. The recently paid up $800 Keene Finance obligation was not included as a reference (R. 26). Nor was the S.A.C. loan mentioned (R. 26), although the bank later became aware of that transaction (R. 28).

On July 3, 1963, Shawmut approved the loan (R. 54, 77). On August 6, Perma-Home forwarded to Shawmut the FH–1 credit application signed by the Conboys and Parker (Govt. Ex. 4), a Perma-Home contract signed by the Conboys and Parker (Govt. Ex. 1), a promissory note signed by the Conboys and endorsed by Leavitt on behalf of Perma-Home (Govt. Ex. 3) and a completion certificate signed by Conboy and Leavitt on behalf of Perma-Home (Govt. Ex. 2; R. 11, 54–57, 76–77). The FH–1 credit application did not mention the prior S.A.C. transaction and no debts were listed. Under the heading stating "List all obligations," the words "No mortgage" appeared (R. 23).

The office manager of Perma-Home testified that it was the usual practice to have all the loan papers prepared for submission to the bank at the same time and that this practice had been followed in regard to the June 29 transaction (R. 54–55, 57). He also testified that it was the usual practice for Leavitt to have before him in a Perma-Home folder all the documents relating to a loan when he signed the completion certificate and endorsed the note (R. 63–64).

ARGUMENT

The sufficiency of the evidence presents no question warranting review by this Court. The jury was justified in concluding that Leavitt, the president of this small corporation, who actively supervised its operations, knew of the falsity of the Conboy credit application.

There was direct testimony by the Perma-Home office manager that it was the usual practice for Leav-

itt to have all the documents for a loan before him when he signed the completion certificate and endorsed the note to be forwarded to the lending institution; and Leavitt was shown to have signed the completion certificate and the note relating to the Shawmut transaction. Therefore, the jury was entitled to infer that he knew the contents of the credit application also.

It was also entitled to infer that he knew the credit application was false. The evidence showed not only that Leavitt had signed the note and completion certificate with respect to the S.A.C. transaction but also that on June 12, 1963, he had signed the $800 rebate check payable to the Conboys at a time when he had all of the pertinent loan papers before him. In addition, the fact that when the credit information was telephoned to Shawmut reference was made to some matters listed on the credit information sheet of the S.A.C. loan, but not to the recently paid off Keene note, indicates that the omission of this information was deliberate, not inadvertent, and the jury could infer that this kind of deliberate suppression would be known to the active head of the company.

In its totality, therefore, the evidence supports the jury's verdict that petitioner Leavitt was aware of and participated in the submission of false information for an F.H.A. loan.[3] Since Leavitt was properly

[3] Contrary to petitioner's contention, there "is no such orthodox rule [against an inference upon an inference]; nor can [there] be." 1 Wigmore, Evidence (3d ed.), § 41. See, also, *Dirring* v. *United States*, 328 F. 2d 512, 515 (C.A. 1), certiorari denied, 377 U.S. 1003; *Ross* v. *United States*, 103 F. 2d 600, 606 (C.A. 9). Rather, the question in every case is whether the totality of circumstances justifies the finding of guilt beyond a reasonable doubt.

found guilty there can be no serious question as to the liability of the corporation of which he was the president and active operating head.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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